fact, Chase charged interest fees in connection with Promotional Purchases. Id. at ¶ 58.

The Court heard oral argument on June 29, 2009. Plaintiff subsequently requested the opportunity to present limited additional briefing in light of the Supreme Court's decision in Cuomo v. Clearing House Ass'n, L.L.C., 129 S. Ct. 2710 (2009). Plaintiff filed a Supplemental Brief on July 7, 2009 and Chase filed a Supplemental Brief on July 14, 2009.

II. PROCEDURAL STANDARD - RULE 12(b)(6)

Under Rule 12(b)(6), a complaint or counterclaims must be dismissed when the allegations fail to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). When considering a 12(b)(6) motion, "all allegations of material fact are accepted as true and should be construed in the light most favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). A court properly dismisses a claim under Rule 12(b)(6) based upon the "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under the cognizable legal theory." Baliesteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). The pleading party's obligation requires more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007) (internal quotation marks omitted). Rather, taking Plaintiff's allegations as true, the alleged violation of law must be plausible. See also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009).

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court generally "may not consider

any material beyond the pleadings." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). When "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). Two exceptions exist to the requirement that consideration of extrinsic evidence converts a 12(b)(6) motion to a summary judgment motion: that material properly submitted as part of the complaint (including attachments to the complaint) and material subject to judicial notice under Federal Rule of Evidence 201. Lee, 250 F.3d at 688-89. Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered on a 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

III. DISCUSSION

Chase attacks the FAC on a number of grounds. The Court denies Defendant's motion in significant part and grants it in part.

A. Preemption

Chase first argues that Plaintiff's First, Second, and Fourth Causes of Action are preempted by the National Bank Act, 12 U.S.C. § 21 *et seq.* ("NBA") and regulations promulgated by the Office of the Comptroller of the Currency ("OCC"), 12 C.F.R. § 7.4008, because Chase is a national bank. Plaintiff argues that there is no preemption because Plaintiff seeks to hold Chase accountable under laws of general applicability that have only an incidental

effect on bank operations. The authority on NBA preemption points in both directions, but the Court ultimately finds that Plaintiff's CLRA claims are not preempted by the NBA or 12 C.F.R. § 7.4008, that Plaintiff's UCL claims are preempted in part and not preempted in part, and that Plaintiff's Fourth Cause of Action is not preempted.

1. General Principles Surrounding Preemption and the NBA

State laws that are preempted by federal law will be invalid by reason of the Supremacy Clause of the Constitution. A federal law "may pre-empt state law in three different ways": by express terms, where federal law is so pervasive that it occupies the entire field, or where state law conflicts with federal law or stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. Bank of Am. v. City and County of S.F., 309 F.3d 551, 557-58 (9th Cir. 2002). "'Federal regulations have no less pre-emptive effect than federal statutes.'" Id. at 560 (quoting Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)).

National banks are protected from state regulation by a tradition of broad preemption. Although there is normally a presumption against the preemption of state laws, in the banking context, the Supreme Court has "interpreted grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." Watters v. Wachovia Bank, N.A., 550 U.S. 1, 12 (2007) (internal quotation marks omitted); Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949, 956 (9th Cir. 2005); Bank of

Am., 309 F.3d at 558-59. The NBA vests in nationally-chartered banks enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). The Act "shields national banking from unduly burdensome and duplicative state regulation"; however, federally chartered banks remain "subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." Watters, 550 U.S. at 11. "States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers." Id. at 12. State law "may not curtail or hinder a national bank's efficient exercise of any . . . power, incidental or enumerated under the NBA." Id. at 13. Incidental powers "include activities closely related to banking and useful in carrying out the business of banking." Bank of Am., 309 F.3d at 562.

2. Authority for and Regulations Governing Preemption with Respect to Credit Card Lending

Credit card lending falls under the purview of national banks' authorized powers. The NBA authorizes national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking," including "by loaning money on personal security." 12 U.S.C. § 24 (Seventh). Additionally, 12 C.F.R. § 7.4008(a) authorizes a national bank to "make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by

the Comptroller of the currency and any other applicable Federal law." Section 7.4008 also discusses preemption with respect to non-real estate lending. Subsection (d), titled "Applicability of state law," provides, in relevant part:

> (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.
>
> (2) A national bank may make non-real estate loans *without regard to state law limitations concerning*: . . .
>
> (iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan; . . .
>
> (viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;
>
> (ix) Disbursements and repayments; and
>
> (x) Rates of interest on loans.

12 C.F.R. § 7.4008(d) (emphasis added). Subsection (e) sets out the types of state laws that are not preempted. In particular, it provides:

> State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers: [¶] (1) Contracts; [¶] (2) Torts; . . . [¶] (8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

Id. § 7.4008(e).

3. Preemption of Plaintiff's Claims

Because Defendant focuses its preemption challenge on express preemption, the parties primarily debate whether Plaintiff's CLRA, UCL, and breach of the implied covenant of good faith and fair dealing claims fall under the preemptive scope of § 7.4008.

a. Predicate Legal Duty

Whether framed by the Supreme Court in Watters or the more specific applicable regulations, a critical threshold task in the preemption analysis is identification of the proper state law that is the subject of the preemption analysis. In the context of generally-applicable laws, the Court's focus is essentially on the law "as applied." Where a plaintiff brings a claim under an unfair competition law, the Court's inquiry is "whether the legal duty that is the predicate of Plaintiffs' state law claim falls within the preemptive power of the NBA or regulations promulgated thereunder." Rose v. Chase Bank USA, N.A., 513 F.3d 1032, 1038 (9th Cir. 2008) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524 (1992)); see also Gibson v. World Savings & Loan Ass'n, 103 Cal. App. 4th 1291, 1301-02 (2002). For example, in Rose, the plaintiffs brought their actions under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, and alleged that the defendant had engaged in unlawful business practices because the defendant's credit card "convenience checks" did not have the disclosures required by California Civil Code § 1748.9. 513 F.3d at 1034-35. The court's analysis focused not on the general applicability of the UCL but on California Civil Code § 1748.9. Id. at 1036-38.

Plaintiff's Complaint rests on four state law claims, three of which are relevant here. First, Plaintiff alleges a Consumer Legal

Remedies Act claim for false advertising, misrepresentation, and inserting an unconscionable provision in the contract. FAC ¶ 38. See Cal. Civ. Code § 1770(a)(9), (14), (19). Second, Plaintiff alleges that Defendant engaged in unfair business practices that include the credit card advertising, the charge of the finance fee, the application of the monthly payments, and inserting an unconscionable arbitration and class action waiver clause. FAC ¶ 47. Fourth, Plaintiff alleges breach of the covenant of good faith and fair dealing for the allocation of payments. Id. at ¶ 58.

b. 12 C.F.R. § 7.4008(d)-(e)

The critical point in the analysis is to determine whether Plaintiff's claims fall into 12 C.F.R. § 7.4008's express preemption provision. As the Court reads § 7.4008, it sets up the following framework for analysis. First, consistent with the general principles of NBA preemption, see Watters, 550 U.S. at 11-12, it is governed by a general preemption statement provideing that state laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers" are simply "not applicable" to national banks. § 7.4008(d)(1). Second, it sets out specific laws that are preempted. § 7.4008(d)(2). Third, it provides guidance on subjects that are not preempted "to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers," such as contracts, torts, and criminal law. § 7.4008(e). Where a state law does not fall into the express preemption provisions of § 7.4008, it will be preempted where it runs afoul of the broader preemption principles discussed above.

i. Silvas, OTS, and OCC

Cases provide some guidance on how to apply these principles. Although the parties each marshal precedent in their favor and distinguish their opponents' cases, the Court has not found a case that is exactly on point.

Defendant argues that the Court is bound by the Ninth Circuit's decision in Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001 (9th Cir. 2008). In Silvas, the Ninth Circuit considered whether the plaintiffs' claim was preempted by the regulations promulgated under a related but distinct statute. There, the plaintiffs sued E*Trade, a federal thrift with whom they had refinanced their mortgage, alleging that E*Trade violated the unfair advertising section of California's UCL, by representing to its customers that its lock-in fee is non-refundable when, under the law, it is refundable under some circumstances. Id. at 1003; see Silvas v. E*Trade Mortg. Corp., 421 F. Supp. 2d 1315, 1317 (S.D. Cal. 2006). Against the backdrop of the significant federal presence in the realm of national banking, the Ninth Circuit considered whether provisions regulating banks under the Home Owners' Loan Act of 1933 ("HOLA") preempted Plaintiff's claim. Specifically, the court looked to a preemption regulation promulgated by HOLA's enforcing authority, the Office of Thrift Supervision ("OTS"), 12 C.F.R. § 560.2. The court noted that § 560.2(a) expressly established that OTS "occupies the entire field of lending regulation for federal savings associations." Id. at 1005 (quoting 12 C.F.R. § 560.2(a)).

Following the guidance by OTS on how to interpret and apply its regulation, the court then applied a two-step process to

determining whether a claim was preempted by the regulation. First, the court looked to whether the state law was a type contemplated by the list in § 560.2(b), which listed preempted statutes. Id. at 1006. To determine whether the claim fell into the list of preempted statutes, the court focused on how the statute - California's UCL - would apply in the particular case, even if the statute applied more generally. See id. If the law was one contemplated by the list, the preemption analysis would end and the claim would be preempted. Id. The court would only reach the question of whether the law fit within the confines of subsection (c) (a provision similar to § 7.4008(e)) if the claim did not fit within the list of specifically preempted laws. Id. at 1006-07; see 12 C.F.R. § 560.2(c). The Ninth Circuit did not reach the second step; instead, it held that because the claim was "entirely based on E*Trade's *disclosures and advertising*," the claim "[fell] within the specific type of law listed in § 560.2(b)(9)," and was therefore preempted. 514 F.3d at 1006 (emphasis in original). See also Weiss v. Washington Mutual Bank et al., 147 Cal. App. 4th 72, 77-78 (2007).

At first glance, Silvas would seem to control the result here. The OTS regulations it considered contain language that is largely parallel to the OCC regulations at issue here. Compare 12 C.F.R. § 560.2(b)-(c) with 12 C.F.R. § 7.4008(d)-(e); cf. Office of the Comptroller of the Currency, Preemption Final Rule, 69 Fed. Reg. 1904-01, 1912 n.62 ("As noted in the proposal, the OTS has issued a regulation providing generally that state laws purporting to address the operations of Federal savings associations are preempted. See 12 CFR 545.2. The extent of Federal regulation and

supervision of Federal savings associations under the Home Owners' Loan Act is substantially the same as for national banks under the national banking laws, a fact that warrants similar conclusions about the applicability of state laws to the conduct of the Federally authorized activities of both types of entities."). Additionally, Silvas considers whether false advertising and unfair competition claims fall in the scope of comparable preemption language. Thus, if Silvas controlled, the Court would be inclined to find that some of Plaintiff's claims - which, like those in Silvas, sound in part in false advertising - are expressly preempted by § 7.4008(d)(2)(viii), which governs "[d]isclosures and advertising."

The Court agrees with Plaintiff, however, that Silvas does not control. First, Silvas involved a field preemption provision and specific guidance from the agency as to how to apply the provisions of the exemption. Although the phrasing of the two regulations is similar, OTS preemption is more sweeping because "OTS occupies the entire field of lending regulation for federal savings associations" in connection with HOLA. 12 C.F.R. § 560.2(a). Courts have cautioned against wholesale application of an OTS/HOLA analysis in the OCC context. See, e.g., Munoz v. Fin. Freedom Senior Funding, 567 F. Supp. 2d 1156, 1162 n.4 (C.D. Cal. 2008) (Carney, J.); Gutierrez v. Wells Fargo Bank, N.A., 2008 WL 4279550, *12 (N.D. Cal. Sept. 11, 2008) (Alsup, J.) ("The language employed by the OCC in its regulations and interpretive letters evidence that application of a more narrow preemption analysis is more appropriate than that applied in Silvas (where the OTS had specifically defined a proper preemption test to be employed).

Here, the OCC itself has attempted to reconcile banking practices with state law in an interpretive letter."); id. at *10-11 (citing OCC Advisory Letter AL 2002-3).[4]

Cases considering whether the NBA and OCC regulations preempt UCL and CLRA claims have tended to distinguish between those claims that arise from generally-applicable duties such as contractual obligations and the duty to refrain from deceptive acts and those claims that rest on alleged violations of statutes specifically aimed at NBA duties. See Miller v. Bank of Am., N.A., 170 Cal. App. 4th 980, 989-90 (2009). In the former case, courts have found no preemption either by applying general NBA preemption principles or by finding that § 7.4008(e) applies. See, e.g., Jefferson v. Chase Home Finance, 2008 WL 1883484 (N.D. Cal. April 29, 2008) (Henderson, J.); Smith v. Wells Fargo Bank, N.A., 135 Cal. App. 4th 1463, 1475-84 (2005).[5] In the latter, courts have found that the state law claims are preempted. See, e.g., Rose, 513 F.3d at 1032; Miller, 170 Cal. App. 4th at 980; Montgomery v. Bank of Am. Corp., 515 F. Supp. 2d 1106 (C.D. Cal. 2007) (Snyder, J.)(in part, finding that UCL claims based on specific means of charging fees conflict-preempted). This distinction is supported by commentary from the OCC, see OCC Advisory Letter AL 2002-3 at 3 n.2, though at least one court has suggested that the OCC's regulations and authority are broad enough that it should be the enforcing body for all

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[4]That said, courts have not uniformly distinguished the two statutes and regulatory schemes in all circumstances. Additionally, Plaintiff does not suggest that the OTS cases are wholly unhelpful. See Gibson, 103 Cal. App. 4th at 1302-04.

[5]The Court notes that Smith appears to apply the presumption against preemption, despite the Ninth Circuit's holdings to the contrary. See Smith, 135 Cal. App. 4th at 1475-76 & n.5.

deceptive practices, see Weiss v. Wells Fargo Bank, N.A., 2008 WL 2620886 (W.D. Mo. July 1, 2008). See also Augustine v. FIA Card Services, N.A., 485 F. Supp. 2d 1172, 1175-76 (E.D. Cal. 2007) (OCC regulations do not preempt claims regarding behavior that is unconscionable or contrary to public policy).

Instead, Plaintiff urges the Court to follow the reasoning of Jefferson v. Chase Home Finance, 2008 WL 1883484 (N.D. Cal. April 29, 2008), which focused on whether the law to be applied was one of general applicability. In that case, the plaintiff sued his mortgage servicer under California's Consumer Legal Remedies Act for, inter alia, making misrepresentations about how it would apply his mortgage payments. The defendant argued that two OCC regulations, 12 C.F.R. §§ 34.4(a) and 7.4009, preempted the plaintiff's claims. Although the regulations provided that banks could make real estate loans without regard to state law limitations regarding terms of credit, disclosure and advertising, processing and servicing of mortgages, repayments, and rates of interest, the court held that the plaintiff's allegations under laws of "general application" like the CLRA and the False Advertising Act, "which merely require all business (including banks) to refrain from misrepresentations and abide by contracts and misrepresentations to customers[,] do not impair a bank's ability to exercise its lending powers." 2008 WL 1883484 at *10. Because they only "'incidentally affect' the exercise of a Bank's power," the court held, they "do not fall into the enumerated categories of § 34.4(a), and are therefore not preempted." Id. The court cited to a California Court of Appeal case in which the court had held that a plaintiff's UCL claims for breaches of

contractual duties were not preempted. Id. (citing Gibson v. World Savings & Loan Ass'n, 103 Cal. App. 4th 1291 (2002)).

With these principles in mind, the Court turns to whether the allegations are expressly preempted by the OCC regulations.

ii. Application

The Court begins by noting that, based on the plain language of the regulation, its reading of generally how to apply the preemption provisions of § 7.4008 is largely consistent with that of the OTS regulations.[6] That is, on the Court's reading of the regulation, the first step is to determine whether the predicate legal duty falls in the scope of § 7.4008(d)(2) or § 7.4008(e). If it falls into neither, the Court must consider whether it violates the general NBA preemption principles.[7] However, the Court's reading of the specific provisions and applications of those provision do not necessarily yield the same result as in the field-preempted OTS context.

The Court finds that Plaintiff's CLRA claims and UCL advertising claims do not fall into the express provisions of § 7.4008(d)(2). Defendant focuses on the false advertising claim and argues that, like in Silvas, a false advertising claim falls into 12 C.F.R. § 7.4008(d)(2)(viii), which provides that a national bank "may make non-real estate loans without regard to state law

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[6]Given that they use somewhat similar language, this makes sense. See 69 Fed. Reg. at 1912 n.62.

[7]The Jefferson court appears to rest on the conclusion that the law at issue is one of general application and move straight to the analysis of whether there was an incidental effect. See Jefferson, 2008 WL 1883484 at *10. The Court's approach therefore differs slightly from the Jefferson court's, though the Court finds that case's reasoning persuasive overall.

limitations concerning . . . (viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents[.]" The Court finds that this language does not expressly preempt generally-applicable laws regarding deceptive advertising. Rather, the specific examples listed suggest that the provision expressly preempts laws regarding particular types of disclosures, such as those like APR that might be included in a state version of the Federal Truth in Lending Act. Although the Court recognizes that the list is exemplary rather than exclusive, the Court notes that the language is aimed at *specific* types of disclosures, rather than general "false advertising" laws. As false advertising laws are widespread, the Court would expect to see such an example.[8] Because the OTS regulations have broader preemptive force, and because the Silvas court considered a UCL claim premised on a TILA violation, a distinction between the Court's finding here and the result in Silvas is not problematic. The predicate duty - to avoid deceptive disclosures - is significantly broader than a specific duty to disclose certain provisions that would fall within the scope of subsection (d)(2)(viii).

To the extent Plaintiff's UCL claims are challenge the allocation of payments *apart* from the way that allocation interacts with deceptive advertising, the Court finds that those claims are expressly preempted by § 7.4008(d)(2)(iv). In part, Plaintiff's

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[8]But see Montgomery, 515 F. Supp. 2d at 1114; Weiss, 2008 WL 2620886 at *2-3.

UCL claim appears to be based on an argument regarding Defendant's charging of a finance fee and the application of monthly payments. See FAC ¶ 47. The exact nature of this claim is unclear to the Court. To the extent Plaintiff alleges that Defendant's allocation of payments violates the UCL because it is contrary to advertisements or the contract, these claims are not preempted. To the extent Plaintiff alleges that the allocation of payments or the charging of a finance fee is generally an unfair act,[9] the Court finds that such a claim seeks to regulate the way in which Chase allocates payments, and falls squarely within § 7.4008(d)(2)(iv). Although the claim could be framed as a "general" attack (like any claim could), the result it seeks squarely impedes on the decision to employ certain lending terms. Unlike the other claims, an attack on the allocation of payments in this way in and of itself does not say "speak the truth" or "comply with the contracts you make," but rather "do not apply payments in this specific way, even if your contract allows as much and even if you have not done so deceptively."

The Court finds that the other CLRA and UCL claims (those related to unconscionable provisions and breach of the implied covenant of good faith and fair dealing) are based in contract, and therefore fall into the scope of § 7.4008(e) so long as they only incidentally affect the exercise of Chase's non-real estate lending practices. Plaintiff's challenge to specific terms on the ground that they are unconscionable does not seek to dictate the terms of

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[9]Given the parties' discussion of forthcoming regulations, it appears that Plaintiff's UCL claim rests in part on declaring unfair the specific way that Chase allocates payments.

credit in a way that would run afoul of either § 7.4008(d)(iv) or the NBA's broader preemption principles: it does not seek to impose a specific term of credit, but rather is part of a general rule of contract law.

The Court finds that the false advertising and contract-based claims have only an incidental affect on lending practices. Contrary to Defendant's argument, the Court does not read all parts of Plaintiff's complaint to seek to preclude Defendant from applying payments in a certain way altogether. (To the extent Plaintiff does seek such a declaration, his claims are expressly preempted by 12 C.F.R. § 7.4008(d)(2)(iv), as discussed above) For the reasons discussed by the Jefferson court, the Court finds that this application of the CLRA and UCL in the advertising-based claims is consistent with the exceptions to NBA preemption. See Jefferson, 2008 WL 1883484 at *12-14. With respect to the claims the Court has identified as contract-related, the Court finds that these claims have at most an incidental effect on the exercise of Chase's lending powers. Such a claim does not seek to force Chase to set its contracts in a certain way, but rather merely to *adhere* to the contracts it does create. A breach of contract claim that concerns lending terms is perhaps closer to preemption than one centered on a contract for employment or maintenance, but the Court does not consider such a claim to fall within the fundamental purposes of the broad national banking preemption.

Thus, on the record before it, the Court denies Defendant's motion on preemption grounds with respect to all but the UCL claims that challenge the allocation of payments or fees as inherently unfair, which the Court dismisses with leave to amend.

B. Failure to State a Claim

Defendant alternatively argues that Plaintiff has failed to state a claim under the CLRA, the UCL, and state contract law.

1. CLRA Allocation of Payments Claim (Cal. Civil Code § 1770(a)(9), (14)

Defendant argues that Plaintiff's allegations regarding the allocation of payments fail to state a claim for violation of the CLRA. As discussed above, Plaintiff's First Cause of Action seeks to allege violations of three provisions of the CLRA. Specifically, Plaintiff alleges that Defendant's acts violate § 1770(a)(9) and (14) in that Defendant (1) advertised goods or services with the intent not to sell them as advertised and (2) represented that the transaction conferred or involved rights, remedies, or obligations that it did not have or involve. FAC ¶ 38.

Defendant argues that Plaintiff fails to plead a CLRA claim because "Plaintiff nowhere alleges that the relied on any supposedly misleading advertising or other statements by Chase concerning promotional purchases, or that any supposed advertisement or representation cause him any harm." Def.'s Mem. at 13. Rather, Defendant argues, "as to the only specific transaction identified. . . , Plaintiff expressly alleges that he did not even request his purchase to be treated as a promotional purchase." Id. (citing FAC ¶ 21). Defendant also argues that the advertisements say nothing about the allocation of payments, and that Plaintiff's claim independently fails for that reason.

"[R]elief under the CLRA is limited to any consumer who suffers any damage *as a result* of the use or employment by any

person of a method act, or practice unlawful under the act." Mass. Mutual Life Ins. Co. v. Super. Ct., 97 Cal. App. 4th 1282, 1292 (2002) (internal quotation marks and alteration omitted) (emphasis in Mass. Mutual). This limitation on relief "requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm." Id. Put differently, causation is "a necessary element of proof" for relief. Wilens v. TD Waterhouse Group, Inc., 120 Cal. App. 4th 746, 754 (2003).

The Court finds Plaintiff's allegations sufficient to state a claim for reliance. Although Plaintiff's allegations preclude him from arguing that he relied on the advertising campaign in *purchasing* the item that was subject to the promotional purchase (and therefore limit his damages accordingly), the Court finds his allegations regarding his payment choices *after* Chase treated his purchase as a promotional payment sufficient to state a claim at the pleading stage. Likewise, at this stage, Defendant's second argument is unavailing, as the Court finds that the FAC pleads a plausible claim.

2. UCL Allocation of Payments Claims

Defendant challenges Plaintiff's allegations regarding his allocation of payments UCL claim on three grounds: (1) that Plaintiff has not sufficiently alleged reliance, (2) that there is nothing unfair about the payment allocation method, and (3) that the doctrine of judicial abstention applies to Plaintiff's claims. Plaintiff's Second Cause of Action seeks relief under the UCL for acts that include (1) advertising promotional items as interest and payment free, (2) charging a finance fee, (3) applying monthly

payments to Promotional Purchases not yet billed or owing instead of to the balance as billed in the monthly statement due, and (4) inserting an unconscionable arbitration and class action waiver clause and "change of terms" clause in its Cardmember Agreement. The Court has dismissed this claim as preempted in part, but some allegations remain.

For the reasons discussed immediately above with respect to reliance and the CLRA claim, the Court denies Defendant's motion on that ground. The remaining challenges appear to go to Plaintiff's allegations regarding the allocation of payments in general, and it therefore appears to the Court that it has already dismissed on preemption grounds the claims to which Defendant's remaining arguments apply.

3. Contract Claims

Defendant argues that Plaintiff has failed to state a claim for breach of contract or for breach of the implied covenant of good faith and fair dealing. Plaintiff alleges that Chase offered Plaintiff a no interest, no payment grace period on Promtional Purchases made using their Rewards Card, and that Plaintiff accepted Chase's offer by making Promotional Purchases. FAC ¶¶ 51-52. Plaintiff alleges that Chase breached these contracts by (1) "prioritizing the allocation of credit card Payments to purchases offered and accepted as interest and payment free ahead of non-promotional items appearing on the monthly statement" and (2) "charging an interest fee on balances that remained due to this allocation of Payments." Id. at ¶ 53. Plaintiff alleges that the same facts show a violation of the implied covenant of good faith and fair dealing. Id. at ¶ 58.

Defendant argues that Plaintiff has failed to state a claim because the contract does not promise to allocate payments in the manner proposed by Plaintiff, but rather the application and cardholder agreement specifically provide that Chase may "allocate [Plaintiff's] payments and credits in a way that is most favorable to or convenient for [Chase]." FAC, Ex. B at 2; Falk Decl., Ex. E at 10, ¶ 9. Defendant argues that, as alleged by Plaintiff, Chase's promotional offer provided only that the promotional balance would be "interest free," not that other balances would not be subject to finance charges and that nothing in the promotional offer provided that the balance did not need to be repaid or that payments would not be allocated to the promotional balance. Reply at 15. Plaintiff argues that the payment allocation clauses of the contract do not undermine his claim. First, Plaintiff notes that the Defendant allocated the payment to amounts that were not yet due or owing as they had not even appeared on Plaintiff's February Statement. Opp'n at 3-4; FAC ¶¶ 24-25. Additionally, Plaintiff argues that the various agreements define "interest free" offers as exempt from the reach of Defendant's payment allocation powers. Opp'n at 4-5.

The Court finds that Plaintiff has stated a claim for breach of contract and breach of the implied covenant of good faith and fair dealing sufficient to survive Defendant's Motion to Dismiss. Although Defendant seems to generally challenge Plaintiff's contract interpretation, the Court is not prepared, on the briefing before it, to perform a contract interpretation analysis that would be required in order to determine whether Plaintiff's interpretation of the contract is the proper one.

4. CLRA Claim for Damages on Unconscionable Contract Provisions

Defendant argues that Plaintiff's CLRA claim for damages with respect to the arbitration clause and change-in-terms provisions is procedurally defective and must be dismissed.

The CLRA includes certain mandatory procedural requirements regarding notice. In particular, California Civil Code § 1782 provides that at least thirty days "prior to the commencement of an action for damages," the consumer "shall" notify the alleged offender of the particular alleged violatiosn and demand that the person "correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation" of the CLRA. Cal. Civil Code § 1782(a)(1)-(2). The notice "shall be in writing and shall be sent by certified or registered mail, return receipt requested." Id. Although it is not jurisdictional, compliance with the notice requirement "is necessary to state a claim." Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d 939, 949 (S.D. Cal. 2007). All of the authorities cited to the Court by the parties have explained that these procedural requirements are strictly adhered to by dismissing a claim with prejudice. As one California District Court noted, even prior litigation on an injunctive relief claim that provides actual notice and an opportunity to correct the behavior does not excuse a party from providing notice in the manner required by § 1782(a). See Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1196 (S.D. Cal. 2005) ("While § 1782(d) authorizes the filing of an action for injunctive relief without first providing notice to the vendor, the statute further directs that such an action may not be converted into an action for damages

unless the consumer first complies with the notice provisions of § 1782(a). Accordingly, § 1782 scrupulously prohibits any action for damages unless its notice provisions are met. As stated, the Legislative goals would be eviscerated if consumers were allowed to sue for damages without first providing the statutorily mandated period for remediation."). Plaintiff's attempt to distinguish these cases is unavailing.

Plaintiff acknowledges that he did not provide notice in the form required by § 1782(a). Instead, he argues that Defendant received actual notice because the parties litigated whether the arbitration clause applied for two years. Because actual notice is not sufficient, the Court dismisses this claim, with prejudice. See, e.g., Outboard Marine Copr. v. Super. Ct., 52 Cal. App. 3d 30 (1975). A claim for injunctive relief remains.

5. CLRA and UCL "Unconscionable Arbitration Clause" Claims

Defendant next challenges Plaintiff's CLRA and UCL claims that seek relief on the ground that Defendant inserted an unconscionable arbitration clause into the contract. As Defendant's argument rests in part on finding that all of Plaintiff's other claims are without merit, the Court denies the Motion.

6. CLRA and UCL Change-in-Terms Provision

Defendant also challenges Plaintiff's allegation that the change-in-terms provision of the original Cardmember Agreement is unconscionable because it gave Chase the right unilaterally to change the Cardmember Agreement at any time. FAC ¶ 31. Defendant argues that Plaintiff fails to state a claim because the term is not unconscionable as a matter of law. In light of the sparse

briefing on this issue, the Court denies the motion on this ground, without prejudice.[10]

C. Pleading with Specificity

Finally, Defendant argues that the FAC fails to plead the CLRA and UCL claims with the specificity required by Federal Rule of Civil Procedure 9(b). Although Plaintiff does not assert fraud as one of his causes of action, Defendant argues that the claim sounds in fraud and therefore is subjec to Rule 9(b)'s heightened particularity requirement. Plaintiff does not exactly dispute this legal argument so much as its implications on Plaintiff's pleading here.

Rule 9(b) applies when (1) a complaint specifically alleges fraud as an essential element of a claim, (2) when the claim "sounds in fraud" by alleging that the defendant engaged in fraudulent conduct, but the claim itself does not contain fraud as an essential element, and (3) to any allegations of fraudulent conduct, even when none of the claims in the complaint "sound in fraud." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102-06 (9th Cir. 2003). Rule 9(b) requires that a plaintiff set forth what is false or misleading about a statement, why it is false, including the "who, what, when, where, and how of the misconduct charged." Id. at 1106.

The Court is satisfied that the FAC has specific enough allegations to satisfy this standard as to those portions of the

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[10]For example, previously the Court's and the Ninth Circuit's unconscionability discussion considered, among other issues, choice of law and discussed unconscionability against California law. Neither party briefs these issues.

CLRA and UCL claims that sound in misrepresentation. Accordingly, the Court denies this portion of the Motion.

IV. CONCLUSION

For the foregoing reasons, the Court denies Defendant's motion in significant part. The Court grants Defendant's motion with respect to (1) the UCL claims seeking to invalidate the payment structure as unfair and (2) the CLRA damages claim.

IT IS SO ORDERED.

Dated: September 3, 2009

DEAN D. PREGERSON
United States District Judge

EXHIBIT F

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GARY DAVIS, an individual, on behalf of himself, and as PRIVATE ATTORNEY GENERAL, and on behalf of all others similarly situated, Plaintiffs, v. CHASE BANK U.S.A., N.A., a Delaware corporation; CIRCUIT CITY STORES, INC., a Virginia corporation , Defendants.	Case No. CV 06-04804 DDP (PJWx) [Motion filed on 5/28/10] **ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Presently before the court is Defendant Chase Bank U.S.A., N.A. ("Chase")'s Motion for Partial Summary Judgment. After reviewing the parties' moving papers, the court grants the motion and adopts the following order.

I. Background

As described more fully in this court's previous orders, Circuit City Stores, Inc. ("Circuit City") offered a special credit card to California residents, who used the card to make purchases

at Circuit City stores. First North American National Bank ("FNANB"), a Georgia bank owned by Circuit City, issued the Circuit City credit cards. Plaintiff Gary Davis opened a Circuit City credit card in August 2003.

Certain credit card purchases were eligible for advertised promotions of "no interest, no payment" or "no interest, with minimum payments" for a specified period of time. First Amended Compl. ("FAC") ¶ 5). According to the FAC, the promotional offer conveyed that the consumer would receive the benefit of a grace period of anywhere from a few months to two years or more to make payments on the promotional item. (Id. ¶ 28.) In fact, all payments made by the consumer on his or her regular monthly statement were allocated first to the promotional item, even if not yet billed and not yet due for many months, rather than to existing balances that were accruing interest. (Id. ¶ 27-28.) As a result, Plaintiff alleges that the promotional offer was a scam used to induce customers into believing that they would have an extended time period in which to pay off their Promotional Purchases, when in fact the consumer had less time to pay off those purchases. (Id. ¶ 28.)

Circuit City financed its (and FNAMBs) credit card operation through a "Master Trust." FNANB, which issued the Circuit City cards and serviced the borrower accounts, transferred credit card receivables to a subsidiary, Tyler Funding. Tyler Funding, in turn, transferred the receivables to the Master Trust. The Master Trust then issued securities, backed by the credit card receivables, to investors ("Certificate holders"). The relationships between FNANB, Tyler Funding, and the Master trust

were governed by a "Pooling Agreement." The Pooling Agreement allowed FNANB to transfer its interests in the Master Trust assets, but only under certain conditions that would protect the value of the receivables-backed securities.

In January 2004, Circuit City agreed to sell its finance operations, including FNANB's credit card operation, to Bank One, Delaware, N.A. ("Bank One"), a Delaware Bank. In October 2004, Bank One merged with Chase Bank USA, N.A. ("Chase").[1] Under the terms of a Purchase and Sale Agreement ("PSA" or "Purchase Agreement"), the finance operation transaction between Chase and FNANB closed on May 25, 2004 (the "closing date").[2],[3]

Chase now moves for partial summary judgment. Chase argues that it is not liable for FNANB's conduct toward Plaintiff prior to the closing date, and seeks to limit Plaintiff's action to the time period after May 25, 2004.

II. Legal Standard

A motion for summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden

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[1] For simplicity's sake, this order refers to both Bank One and Chase as "Chase."

[2] FNANB, Tyler Funding, Circuit City, and Chase (Bank One) were all parties to the PSA. (Declaration of Daniel Tierney, Exhibit F.)

[3] This court's explanation of these complex financial arrangements is not drawn from any one source, but rather from the various, separate agreements described herein.

of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue as to which the nonmoving party will have the burden of proof, however, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. See id. If the moving party meets its initial burden, the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

It is not the Court's task "to scour the record in search of a genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996). Counsel have an obligation to lay out their support clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001). The Court "need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposition papers with adequate references so that it could conveniently be found." Id.

III. Discussion

As an initial matter, the parties differ as to which state's law controls this issue. Both FNANB and Chase included choice of law clauses in their cardmember agreements with account holders, such as Plaintiff. Chase argues that the law of Georgia, where

FNANB was located, should govern this dispute, or that, in the alternative, the law of Delaware, where Chase is incorporated, controls. (Motion for Partial Summary Judgment ("MSJ") at 17, 20.) Plaintiff acknowledges that his claim could not survive under Georgia or Delaware law, and argues that California law controls. (Opposition at 11-14.) The court need not resolve the choice of law issue, however, because even under California law, Plaintiff cannot show that Chase is liable for FNANB's conduct prior to the closing date.

Generally, an asset purchaser does not assume the seller's liabilities. Ray v. Alad Corp., 19 Cal.3d. 22, 28 (1977). There, are, however, exceptions to this general rule. A purchasing corporation may assume a selling corporation's liabilities if, as relevant here, (1) the purchaser expressly or impliedly agrees to assume liability or (2) the purchasing corporation is a mere continuation of the seller.[4] Id. The court addresses each potential exception in turn.

A. Express Assumption

Plaintiff first argues that Chase expressly assumed all of FNANB's liabilities for pre-closing date conduct toward cardholders such as Plaintiff. (Opp. at 6). The court disagrees. Section 2.04 of the Purchase Agreement listed Chase's assumed liabilities. As relevant here, such liabilities included:

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[4] Though Plaintiff invokes the "mere continuation" exception to the general rule against successor liability, California courts have held that the "mere continuation" exception is a subset of a closely related inquiry: whether the asset transaction amounts to a consolidation or merger. Franklin v. USX Corp., 105 Cal.Rptr.2d 11, 17 (Ct. App. 2001).

> [A]ll obligations and Liabilities of Sellers to Borrowers under the Account Agreements that exist as of, or are incurred or accrue after, the Cut-Off Time, other than any such obligation of Liability that arises from any breach or default or violations of any Requirements of Law by Sellers occurring before the Cut-Off Time

(Tierny Dec., Exhibit F at 72 (emphasis added).) Section 2.04 also states that Chase "shall not assume any liability . . . of Circuit City, FNANB and Tyler Funding . . . arising from or related to the operation of the Sellers' business prior to or after the Cut-Off Time." Id. at 73. This language explicitly disclaims liability for FNANB's conduct toward borrowers, such as Plaintiff, prior to the closing date.

Plaintiff argues that the PSA alone does not fully describe Chase's obligations. Indeed, Section 12.04 of the PSA does refer to and incorporate "Related Agreements," as well as exhibits and schedules attached to those agreements. Id. at 138. Among these related agreements is an "Assumption Agreement." Id. at 63. The Pooling Agreement is listed under Schedule 1 to the Assumption Agreement. (Declaration of Andrew J. Sokolowski, Exhibit B at 133.)

The Pooling Agreement allowed FNANB to transfer its interest in the Master Trust, but only under certain conditions. Among those conditions was the requirement that Chase, as the acquiring Transferor and Servicer, "expressly assume . . . the performance of every covenant and obligation of the Transferor [and Servicer]. . . ." (Id. at 239, 241.) No covenant contained in the Pooling Agreement, however, makes any reference to borrowers. The Pooling Agreement explicitly lists the parties, Certificate Owners, and

Certificateholders as the only beneficiaries of the Pooling Agreement. (Id. at 270.)

Furthermore, each of the covenants cited by Plaintiff clearly refers to and is intended to protect investor interests, not those of borrowers. Section 2.5(c), for example, requires the bank to comply with all Account Agreements, except insofar as failure to do so "would not materially and adversely affect the rights of the Trust or the Investor Certificateholders . . . ."[5] (Id. at 202 (emphasis added)). Section 2.5(c) also obliges the bank to comply with "all Requirements of Law[,] the failure to comply with which would have a material adverse effect on the Investor Certificateholders . . . ." (Id. (emphasis added).) Similarly, Section 3.3(g) requires the Servicer to "comply in all material respects with all other Requirements of Law in connection with servicing each Receivable and the related Account the failure to comply with which would have a material adverse effect on the Certificateholders . . . ." (Id. at 214 (emphasis added).) These covenants make no mention of borrowers such as Plaintiff.

The Pooling Agreement's liability and indemnity provisions also focus solely on investors. Section 8.4 obligates the Transferor to accept liability to "the injured party" for injuries arising out of the Pooling Agreement, and to "pay, indemnify, and hold harmless each Investor Certificateholder against and from any and all such losses . . . ." (Id. at 241 (emphasis added.)) Section 8.4 obligates the Servicer to indemnify the Master Trust for liabilities arising out of the Pooling Agreement "for the

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[5] Section 3.1(f) contains virtually identical language. (Sokolowski Dec., Exhibit B at 212.)

benefit of the Certificateholders." (Id. at 243). None of the Pooling Agreement's covenants or obligations create duties or obligations to borrower such as Plaintiff.

Under the Assumption Agreement, Chase agreed to perform the covenants contained in the Pooling Agreement, as it was required to do to satisfy the Pooling Agreement itself. As both Servicer (of the credit card accounts) and Transferor (of the receivables), Chase agreed, under the Assumption Agreement, to be liable "to the Certificateholders [][and] the Trustee . . . ." (Id., Exhibit A at 126.) Though Chase agreed in the Assumption Agreement to perform the covenants of the Pooling Agreement, no provision of either agreement constituted an express assumption of pre-closing date liabilities to Plaintiff. The "express assumption" exception to the general rule against successor liability therefore does not apply.

B. Mere Continuation

In the alternative, Plaintiff argues that Chase was a "mere continuation" of FNANB. "The general rule of successor liability is that a corporation that purchases all of the assets of another corporation is not liable for the former corporation's liabilities unless, among other theories, the purchasing corporation is a mere continuation of the selling corporation." Katzir's Floor and Home Design, Inc. v. M-MLS.com, 394 F.3d 1143, 1150 (9th Cir. 2004). To demonstrate mere continuation, Plaintiff must show (1) a lack of adequate consideration for the selling corporation's assets or (2) that at least one person was an officer, director, or shareholder of both corporations. Id. Lack of inadequate consideration is an "essential ingredient" of a "mere continuation" claim. Id.

As the Ninth Circuit has held, the "mere continuation" inquiry is only relevant where one corporation acquires "all of the assets of another corporation." Id. There is no evidence that Chase acquired all FNAMB or Circuit City assets. Indeed, under the Purchase Agreement, FNANB retained several assets, including cash, furniture, fixtures, and all Circuit City customer data. (Tierney Dec., Exhibit F at 71-72.) FNANB received $475.9 million in cash from Chase under the Purchase Agreement. (Declaration of Stephen J. Newman, Exhibit D at 42.) At the time FNANB liquidated in July 2004, over two months after the asset sale, FNANB possessed almost $84 million in assets. (Id., Exhibit G at 49.) Circuit City continued operations for over four years after the Chase asset purchase (Id., Exhibit 0 at 85.) Because Plaintiff has not demonstrated that Chase acquired all of FNAMB's assets, there is no issue of material fact as to whether Chase was a "mere continuation" of FNANB.[6]

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[6] Plaintiff requests additional discovery to show that Chase and FNAMB shared common officers, directors, and employees, and that the $1.1 billion in consideration (including $475.9 million in cash) Chase paid to FNAMB was inadequate. Such evidence could prove relevant to a "mere continuation" inquiry. As discussed above, however, under Katzir, the "mere continuation" analysis is only applicable where one corporation has acquired all of the assets of a second corporation. Because Plaintiff has not demonstrated that Chase acquired all FNAMB assets, the additional evidence Plaintiff seeks would not be sufficient to defeat summary judgment.

IV. Conclusion

For the reasons set forth above, the Court GRANTS the Partial Motion for Summary Judgment with respect to all claims related to conduct prior to Chase's acquisition of FNANB's credit card assets on May 25, 2004.

IT IS SO ORDERED.

Dated: November 15, 2010

DEAN D. PREGERSON
United States District Judge

EXHIBIT G

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GARY DAVIS, an individual, on behalf of himself, and as PRIVATE ATTORNEY GENERAL, and on behalf of all others similarly situated, Plaintiff, v. CHASE BANK U.S.A., N.A., a Delaware corporation; CIRCUIT CITY STORES, INC., a Virginia corporation , Defendants.	Case No. CV 06-04804 DDP (PJWx) **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IN PART, AND DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION** [Dkt. Nos. 210, 215]

Presently before the court is Defendant Chase Bank U.S.A., N.A. ("Chase")'s Motion for Summary Judgment ("Motion") and Plaintiff's Motion for Class Certification ("Cert. Mot."). Having reviewed the submissions of the parties and heard oral argument, the court grants the motion and adopts the following order.

I. Background

As described more fully in this court's previous orders, Circuit City Stores, Inc. ("Circuit City") offered a special credit

card to California residents, who used the card to make purchases at Circuit City stores. First North American National Bank ("FNANB"), a Georgia bank owned by Circuit City, issued the Circuit City credit cards. Plaintiff Gary Davis ("Plaintiff") opened a Circuit City credit card account ("Account") in August 2003. In January 2004, Circuit City agreed to sell its finance operations, including FNANB's credit card operation, to Bank One, Delaware, N.A.("Bank One"), a Delaware Bank. In October 2004, Bank One merged with Defendant Chase Bank USA, N.A. ("Chase").

A. The Credit Card Agreement

Plaintiff's Account was governed by a Cardmember Agreement ("Agreement"). The Agreement stated that "any purchases made under [the Account] will be made for personal, family, and household purposes." (Decl. of Daniel Tierney in Supp. of Mot. ("Tierney Decl."), Exs. 1-3.) The Agreement also set forth the terms under which payments would be due and interest charged. The Agreement stated that no interest would be charged if the consumer paid the existing balance of his or her account, as set forth in the last billing statement, by the due date shown on that statement.[1] Paragraph 9 of the Agreement reads:

> . . . [W]e do not charge periodic Finance Charges on new purchases billed during a billing cycle if we receive payment of your New Balance by the date and time your minimum payment is due as shown on your billing statement and we received payment of your New Balance on your

[1] The Agreement refers to this ending balance as the "New Balance." ("Your billing statement shows your beginning balance and your ending balance (the 'New Balance' on your billing statement).") (Tierney Decl. Ex. 3 at ¶ 7.)

> previous billing statement by the date and time your payment was due as shown on that billing statement.

(Tierney Decl. Ex. 3 at ¶¶ 7, 9.)

The Agreement also stated that Chase could "allocate payments and credits in a way that is most favorable to or convenient for [Chase]." (Tierney Decl., Ex. 3 at ¶ 9.) For example, Chase could "apply. . . payments and credits to balances with lower Annual Percentage Rates (such as promotional Annual Percentage Rates) before balances with higher Annual Percentage Rates." (Id.)

Certain credit card purchases were eligible for advertised promotions of "no interest, no payment" or "no interest, with minimum payments" for a specified period of time. (First Amended Compl. ("FAC") ¶ 5). According to the FAC, the promotional offer conveyed that the consumer would receive the benefit of a grace period of anywhere from a few months to two years or more to make payments on the promotional item. (Id. ¶ 28.)

During the promotional grace period, finance charges on the promotional item would accrue, but would not be charged, so long as the consumer paid off the promotional item in full by the end of the promotional period. Only if the customer failed to pay in full by the end of the grace period would the accumulated finance charges be added to the balance. Paragraph 10 of the Agreement reads, in relevant part:

> Interest Free Special Purchases. . . are special promotional purchase balances. . . for which Finance Charges accruing on the balance are not added to your Account balance but instead are accumulated from billing cycle to billing cycle and posted to your Account as Accumulated Finance Charges only if the Interest Free Special Purchase . . . has not been paid in full by the

> end of the time period specified in the promotional offer. . . Until Accumulated Finance Charges are posted to your Account, we refer to these amounts as "Deferred Finance Charges."
>
> . . .
>
> Special Promotional Options. We may at various times offer special promotional options. These promotions are subject to the terms and conditions in this Agreement, as modified by the terms of the promotion, which will be disclosed at the time of the offer. Any transaction charging to your Account a purchase ... identified as having any of the special promotional terms described herein or other promotional terms disclosed at the time of our offer, will constitute your agreement that the applicable promotional terms will apply to that transaction.

(Tierney Decl. Ex. 3 at ¶ 10.) Finally, the Agreement states that where the terms of the promotional offer and the Agreement conflict, the terms of the promotional offer modify the Agreement. (Tierney Decl. Ex. 3 at ¶ 19.)

In practice, all payments made by a consumer were allocated first to the promotional interest-free item, even if not yet billed and not fully due for many months, rather than to existing, non-promotional balances that were accruing interest. (FAC ¶ 27-28.) As a result, Plaintiff incurred finance charges even though he submitted payments sufficient to pay off the balance of his account each month.

For example, in March 2006, Plaintiff purchased a $2,000 television from Circuit City under a promotional offer in which no interest or payments were to be due until January 2008. (Id. at ¶ 25.) Plaintiff submitted a payment of $1,736.91 to cover his pre-existing February balance. Instead of allocating Plaintiff's payment to his pre-existing balance, Chase applied the entire payment toward the just-purchased television, despite the

promotional interest and payment-free grace period. Because Plaintiff's entire payment was allocated to the promotional purchase, there were insufficient funds to cover Plaintiff's pre-existing February statement balance. Accordingly, Chase assessed a finance charge.

In June 2006, Plaintiff filed a putative class action complaint in California state court on behalf of himself and others similarly situated. Defendants removed to this court in August 2006. In March 2009, Plaintiff filed a First Amended Complaint, alleging that Chase (1) violated the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1770, (2) violated California Business and Professions Code § 17200, (3) breached the Agreement, and (4) breached the implied covenant of good faith and fair dealing. In short, Plaintiff alleges that the promotional offer was a scam used to induce customers into believing that they would have an extended time period in which to pay off their Promotional Purchases, when in fact the consumer had less time to pay off those purchases. (FAC ¶ 28.)

This court previously dismissed Plaintiff's CLRA claim. Chase now moves for summary judgment under Fed. R. Civ. P. 56 on the three remaining claims.

II. Legal Standard

A motion for summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue as to which the nonmoving party will have the burden of proof, however, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. See id. If the moving party meets its initial burden, the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

It is not the court's task "to scour the record in search of a genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996). Counsel have an obligation to lay out their support clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001). The court "need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposition papers with adequate references so that it could conveniently be found." Id.

A party seeking class certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met. See Hanon v. Dataprods. Corp., 976 F.2d 497, 508-09 (9th Cir. 1992). Rule 23(a) sets forth four prerequisites for class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); Hanon, 976 F.2d at 508. These four requirements are often referred to as numerosity, commonality, typicality, and adequacy. See Gen. Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982). A plaintiff seeking to certify a class under Rule 23(b)(3) must show that questions of law or fact common to the members of the class "predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

"In determining the propriety of a class action, the question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (internal quotation and citations omitted). This court, therefore, considers the merits of the underlying claim to the extent that the merits overlap with the Rule 23(a) requirements,

but will not conduct a "mini-trial" or determine at this stage whether Plaintiffs could actually prevail. Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981, 983 n.8 (9th Cir. 2011).

III. Discussion

A. Chase's Motion for Summary Judgment

1. Breach of Contract

A plaintiff suing for breach of contract must show that he has himself performed in accordance with the terms of the contract. Brown v. Dillard's, Inc., 430 F.3d 1004, 1010 (9th Cir. 2005); Cons. World Invs., Inc. v. Lido Preferred, Ltd., 9 Cal. App. 4th 373, 380 (1992). Chase argues that Plaintiff breached the Agreement by purchasing products with his Circuit City credit card for business, rather than personal, use. (Mot. at 7-10.)

When deposed, Plaintiff testified that he operated an electronics consulting business. (Declaration of Joseph A. Escarez in Support of Motion, Ex. 1 ("Davis Depo.") at 44.)[2] Chase asserts that many of the purchases Plaintiff made with his Circuit City card were connected to Plaintiff's electronics consulting business. Plaintiff further benefitted from this type of activity, Chase contends, by earning Circuit City "Rewards

[2] Chase further asserts that Plaintiff earned at least $100 per hour to, in his words, "help friends with electronic issues." (Reply at 2.) Chase also contends that finding and buying electronic equipment was part of Plaintiff's business. (Id.) Though Chase supports its assertions with citations to the Davis Deposition, several of the cited pages (e.g. pp. 42-43) are not included in the excerpts provided to the court in Exhibit 1 to the Escarez Declaration. Plaintiff has not disputed any of Chase's representations regarding the Davis deposition, nor raised any objection to the transcript excerpts.

Points," which were exchangeable for goods at Circuit City stores, and by essentially obtaining cash advances on his credit card while avoiding the terms applicable to such advances.[3] (Id. at 9.)

Chase argues that Plaintiff harmed Chase by exposing it to the higher degree of risk associated with a business credit line (Id. at 10-11), by removing from its practical grasp products in which it had a security interest, and by depriving it of the fees it would have been entitled to collect had Plaintiff taken a cash advance on the Account.[4] (Id. at 14.)

Plaintiff's credit card statements reveal that between 2005 and 2006, he purchased at least ten televisions, as well as several accessories such as flat screen t.v. mounts, audio cables, video recorders, and blank recording media. (Escarez Decl., Ex.2; Mot. at 8 (citing television purchases).) Plaintiff lived alone at the time. (Davis Depo. at 73:12-16.)

Chase posits that the March 2006 promotional purchase of the $2,000 television set described above was itself part of a business transaction. (Mot. at 8.) The parties do not dispute that Plaintiff bought the set for a third party, John Godfrey, who

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[3] The Agreement provides that cardholders may obtain cash advances, as well as "cash-like charges" such as traveler's checks and money orders. (Tierney Decl., Ex. 3 at ¶3.) These cash and cash-like transactions are subject to higher interest rates and transaction fees than normal credit purchases of goods. (Id. at ¶ 8.)

[4] Paragraph 21 of the Agreement granted Chase "a purchase money security interest. . . in each item of merchandise purchased at a Circuit City store or otherwise from Circuit City on [Plaintiff's] Account, to secure payment in full of all amounts owed to [Chase] in connection with the purchase of that item."

took original possession of the set and gave Plaintiff $2,000 cash in return (the "Godfrey Transaction"). (Davis Depo. at 92.) Plaintiff testified that he bought the t.v. for Godfrey because "[i]t was helpful for both [Plaintiff and Godfrey.]]" (Id.) Plaintiff explained that he "helped [Godfrey] choose the best television and helped him get the best price," while Plaintiff himself was helped by getting "$2,000 cash in return for putting $2,000 on [the Circuit City] credit card and . . . rewards points, which . . . would have equaled $100." (Id. at 93.) Godfrey, who Plaintiff described as a "close friend," did not otherwise compensate Plaintiff. (Id.)

Plaintiff denies that these transactions were business-related. In a declaration submitted in opposition to the instant motion, Plaintiff reiterates that Godfrey "was a close personal friend." (Declaration of Gary Davis at ¶4.) Plaintiff further states that he "was not paid any fee nor did [Plaintiff] make any profit from Godfrey." (Id.) Plaintiff also asserts that while he sometimes made Circuit City purchases for other people, he never marked up those purchases or profited from the re-sale of the Circuit City items. (Id. at ¶ 3.) The declaration explains that during the relevant time period, "flat-screen TVs were just coming into the mainstream, but some of these early models weren't very

good. This is why [Plaintiff] purchased and returned a number of flat-screen TVs to Circuit City."[5] (David Decl. at ¶2.)

The new declaration also again describes Plaintiff's motivation for conducting the Godfrey transaction. Plaintiff states that "[t]he purpose of the transaction was to help [Plaintiff's] friend get the best TV at the best price." (David Decl. ¶ 7.) Chase argues that this statement is intended to avoid summary judgment by contradicting Plaintiff's prior testimony, and should be stricken. (Reply at 3.) A party may not, however, create an issue of fact by contradicting prior deposition testimony. Van Asdale v. Int'l Game Tech., 577 F.3d 989, 998 (9th Cir. 2009); Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991). The court may, therefore, strike contradictory, sham affidavits intended to avoid summary judgment. Id. at 267. Plaintiff's new statement regarding his motivation for engaging in the Godfrey transaction, however, does not contradict his deposition testimony. Plaintiff originally testified that he bought the TV to help Godfrey get the best product at the best price (Davis Depo. at 93:1-2.) Plaintiff also originally testified, consistent with his more recent declaration, that he was reimbursed for the purchase and expected to receive Circuit City Rewards Points. (Id. at 93.)

[5] Plaintiff points to no specific evidence, whether in credit card statements or elsewhere, showing that he returned any televisions. While it appears that Plaintiff did return at least one TV (Escarez Decl., Ex. 2 at CHAJUN 174), the court notes that it is not the court's task "to scour the record in search of a genuine issue of triable fact." Keenan, 91 F.3d at 1278.

There exists a genuine dispute of material fact concerning Plaintiff's purpose in entering into the Godfrey transaction and other television and electronics purchases. Chase has presented evidence that Plaintiff operated an electronics consulting business, purchased many televisions and other electronics in a short time period, and received cash for at least one TV that Plaintiff purchased, but never possessed. Plaintiff has presented evidence that he never received compensation of any kind from Godfrey, that he simply deposited the cash he received into a checking account and used it to pay his credit card bill (Davis Decl. ¶ 7), bought the TV for Godfrey simply to help a friend get a good deal, and bought ten or more TVs because some of them "weren't very good." (Id. ¶ 2.) Whether Plaintiff's explanations are credible is a question reserved for a trier of fact.

2. Implied Covenant

Chase also argues that Plaintiff's Fourth Cause of Action for Breach of the Implied Convenant of Good Faith and Fair Dealing is duplicative of the Third Cause of Action for Breach of Contract. (Mot. At 17.) Because, Chase argues, the parties made an express agreement regarding payment structure and allocations, the implied covenant claim is duplicative of Plaintiff's breach of contract claim. (Id.) The court agrees. Plaintiff's opposition on this issue explains how and why Chase's allocation scheme was a breach of the Agreement's terms. (Opp. at 13-17.) Given the apparent conflict between the payment allocation clause of the Agreement

and the promotional purchase language, the meaning of the contract has yet to be determined. That question of contract interpretation is not presently before the court. Nevertheless, it is clear that the contract does govern the substance of Plaintiff's good faith and fair dealing claim. "[W]here breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." Guz v. Bechtel Nat. Inc., 24 Cal. 4th 327, 327 (Cal. 2000).[6] Accordingly, the court grants Chase's motion for summary judgment with respect to the Fourth Cause of Action.

B. Class Certification

In light of the above discussion of questions of disputed, material fact at issue here, Plaintiff's Motion for Class Certification must be denied. The factual circumstances surrounding Plaintiff's purchases are so atypical as to fall below the normally permissive standard of Rule 23(a)'s typicality requirement. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Furthermore, questions regarding Plaintiff's individual circumstances are likely to predominate over factual questions common to the class. Fed. R. Civ. P. 23(b)(3).

IV. Conclusion

For the reasons stated above, Defendant's Motion for Summary Judgment is GRANTED in part and DENIED in part. The court GRANTS

[6] This court previously ruled that California law applies to this matter. (Dkt. No. 42.)

summary judgment with respect to the Fourth Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing. In all other respects, Defendant's Motion for Summary Judgment is DENIED. Plaintiff's Motion for Class Certification is DENIED.[7]

IT IS SO ORDERED.

Dated: January 16, 2013

DEAN D. PREGERSON
United States District Judge

[7] Having determined that Plaintiff cannot satisfy the typicality or predominance of fact requirements under Rule 23, the court does not reach the remaining class certification factors.

EXHIBIT H

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[Additional Counsel Continued On Next Page]

Attorneys for Plaintiff GENE CASTILLO, individually, and on behalf of all others similarly situated

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GARY DAVIS, an individual; on behalf of himself, and as PRIVATE ATTORNEY GENERAL, and on behalf of all others similarly situated,

Plaintiff,

v.

CHASE BANK U.S.A., N.A., a Delaware corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. CV 06 4804 DDP (PJWx)

Honorable Dean D. Pregerson

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declarations of Drew E. Pomerance, Jeff S. Westerman, Nicole D. Fricke, and Wyatt Lim-Tepper, and Motion for Attorneys' Fees and Expenses and Service Awards Filed Concurrently]

Date: **October 27, 2014**
Time: **11:00 a.m.**
Courtroom: **3**

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GENE CASTILLO, individually,
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PLEASE TAKE NOTICE that on October 27, 2014 at 11:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Dean D. Pregerson in Courtroom 3 of the above-entitled court, located at 312 North Spring Street, Los Angeles, California, Plaintiff Gene Castillo will move this Court for an order: (1) granting final approval of the settlement in this case; (2) approving the terms of the settlement as set forth in the Stipulation and Agreement of Settlement filed on April 23, 2014, and for which preliminary approval was granted on June 5, 2014; and (3) certifying the class for settlement purposes.

Defendant Chase Bank U.S.A., N.A. (Chase) does not oppose this motion, which is being made following conferences between counsel earlier this year, pursuant to L.R. 7-3.

This motion is based on this notice and motion, the accompanying memorandum of points and authorities, the declarations of Drew E. Pomerance, Nicole D. Fricke, Jeff S. Westerman, and Wyatt Lim-Tepper, and documents attached thereto, all the matters of record filed with the Court, and such other evidence and argument as may be submitted to the Court.

DATED: August 29, 2014 ROXBOROUGH, POMERANCE, NYE & ADREANI, LLP

By: s/ Drew E. Pomerance
DREW E. POMERANCE
BURTON E. FALK
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GENE CASTILLO, individually,
and on behalf of all others similarly situated

DATED: August 29, 2014 WESTERMAN LAW CORP.

By: s/ Jeff Westerman
JEFF WESTERMAN
Attorneys for Plaintiff
GENE CASTILLO, individually,
and on behalf of all others similarly situated

DATED: August 29, 2014 MILBERG LLP

By: s/ Nicole Duckett Fricke
NICOLE DUCKETT FRICKE
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and on behalf of all others similarly situated

I. INTRODUCTION

The settlement reached in this case is the result of an eight year litigation odyssey involving extensive investigation, analysis and discovery, multiple and complex motion work, an appeal to and decision from the Ninth Circuit, three formal mediation sessions, and hard fought negotiations by experienced arm's length counsel. On June 5, 2014, the Court granted preliminary approval of the Stipulation and Agreement of Settlement (Settlement) filed on April 23, 2014, and approved the proposed notice program. *See* Court's Preliminary Approval Order dated June 5, 2014 (Docket No. 340.)

The terms of the settlement more than meet the requirements for final approval. Chase has agreed to pay $5.5 million in cash benefits to resolve this matter, including direct payments to specified Settlement Class Members who need not file a claim. The class action alleged that Chase misled consumers and failed to properly apply its customers' payments first to regular balance purchases before promotional purchases. The result was that class members were wrongly assessed finance charges on those purchases.

This settlement pays real cash benefits back to class members and compensates them for some of the finance charges that Chase assessed against them. The settlement is the result of extensive negotiations that continued on and off for the past four years, substantial discovery, investigation, and analysis to verify the size and extent of the potential class, the potential damages the Class members incurred, as well as a thorough analysis of Plaintiff's legal theories and Chase's defenses – both on the merits and having to do with class certification issues. The parties also twice mediated the dispute before the Honorable Edward Infante, Ret., who helped broker the terms of the Settlement. Judge Infante is a former U.S. Magistrate Judge and respected mediator with significant experience in mediating large, complex class actions like this.

As set forth below, the settlement is fair, reasonable and adequate, and in

the best interest of the Settlement Class. Therefore, final approval should be granted.

II. BACKGROUND OF THE CASE

A. The Allegations

Gary Davis filed this putative class action complaint on June 26, 2006, alleging that Chase misled and deceived consumers in the manner in which it applied credit card payments to promotional purchases made at Circuit City. Mr. Davis alleged causes of action for violation of the Consumers Legal Remedies Act, violation of Business & Professions Code §17200, violation of Business & Professions Code §17500, fraud and deceit, breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. The class action sought restitution and compensatory damages.

The basis of the lawsuit is the allegation that Chase engaged in a deceptive and unfair business practice of misrepresenting a promotional purchase program and then misallocating payments made by customers participating in the program. The lawsuit alleged that this resulted in customers not only failing to receive the benefit of Chase's promotional offer, but also being wrongly assessed finance and interest charges in violation of Chase's cardmember agreement.

The class action alleged Chase marketed promotional rewards card purchases at Circuit City as "interest free" (or some variant thereof) but charged California credit cardholders interest and fees for those purchases. (First Amended Complaint (FAC), ¶ 1, Docket No. 91.) The class action asserted that Chase improperly applied credit card payments to the "interest free" promotional balances that were not due before applying them to interest-bearing, non-promotional balances, causing consumers to incur interest and fees they otherwise would not have and in direct contradiction to Chase's advertising and its cardmember agreement. (Id. at ¶¶ 1, 20-25.)

B. Procedural History

After the June 2006 filing of the case in state court, Defendants removed the action to this Court in August 2006. (Docket No. 1.) After addressing removal and remand issues, the case was stayed for approximately 21 months due to an appeal of the Court's determination that Chase's arbitration clause and class action waiver provisions in its cardmember agreements were unenforceable under California law. This Court's determination was eventually affirmed by the Ninth Circuit. (Docket No. 80.) Around that time, the claims against Circuit City were withdrawn due to its bankruptcy. (Docket No's. 79, 91.)

On March 17, 2009, a First Amended Complaint was filed. (Docket No. 91.) On September 3, 2009, the Court dismissed the Unfair Competition Law claim to the extent it challenged the allocation of payments apart from the way that allocation intersects with deceptive advertising. (Docket No. 112.) The Court subsequently dismissed the Consumers Legal Remedies Act claim, and determined that Chase is not liable for any claims related to conduct prior to Chase's May 25, 2004 acquisition of the credit card assets at issue in the case. (Docket No's. 167, 203.) On January 16, 2013, the Court granted summary judgment on the breach of the implied covenant of good faith and fair dealing claim. (Docket No. 291.) Accordingly, the two claims that remain are breach of contract and a limited claim for violation of the Unfair Competition Law.

The Court also denied the Motion for Class Certification on January 16, 2013. (Docket No. 291.) The denial was based on the Court's finding that the "factual circumstances surrounding [Gary Davis'] purchases are so atypical as to fall below the normally permissive standard of Rule 23(a)'s typicality requirement." The Court found that "questions regarding [Gary Davis'] individual circumstances are likely to predominate over factual questions common to the class." (Docket No. 291.)

Gene Castillo subsequently moved for an order granting leave to file a

complaint in intervention. Mr. Davis moved simultaneously, and in the alternative, for leave to file a second amended complaint adding Gene Castillo as a party Plaintiff. (Docket No. 293.) Chase moved to dismiss the entire case as moot. (Docket No. 296.) The Court vacated the hearings on these motions when it granted preliminary approval of the Settlement and set a final approval hearing for October 27, 2014. (Docket No. 339.)

C. Mediation and Settlement

The parties initially participated in private mediation on June 18, 2009. (Declaration of Drew E. Pomerance (Pomerance Decl.), ¶ 2.) A second mediation with a different neutral, the Honorable Edward Infante, Ret., took place on November 16, 2011. The parties remained unable to resolve the litigation. (Pomerance Decl., ¶ 3.)

Following the Court's denial of the Motion for Class Certification, the parties participated in a third mediation on October 22, 2013. This mediation was again held with Judge Infante. (Pomerance Decl., ¶ 4.) Drew E. Pomerance of Roxborough, Pomerance, Nye & Adreani, LLP and Jeff Westerman of Westerman Law Corp., attended on behalf of the class, while Chase was represented by its attorneys, Julia Strickland and Stephen Newman of Stroock & Stroock & Lavan, LLP. Also attending the mediation on behalf of Chase were several of its authorized representatives. (Pomerance Decl., ¶ 5.) The mediation session lasted all day, and resulted in a tentative agreement which was subject to confirmatory discovery whereby Chase would have to verify under oath the size of the Settlement Class, the amount of finance charges that Plaintiff contends were improperly charged and collected by Chase, and the period of time in which the promotional purchases were made. (Pomerance Decl., ¶ 6.)

Chase produced a detailed declaration under penalty of perjury from Suzanne Morgan, a Risk Director in Chase's Risk Department who has worked for Chase or its predecessor Bank One since 1997. Ms. Morgan is familiar with

and oversaw the compilation of data that produced information necessary for Class Counsel to evaluate the reasonableness of the settlement. (Pomerance Decl., ¶ 7.) After carefully evaluating Ms. Morgan's declaration, Class Counsel determined that the existing deal adequately compensates the Settlement Class. (Pomerance Decl., ¶ 8.) The parties then formalized and finalized a settlement agreement.

The settlement agreement calls for Chase to establish a settlement fund totaling $5.5 million. (Pomerance Decl., ¶ 9.) Class Counsel remain confident that they have properly evaluated the risks of further prosecuting this class action as compared to the benefits of the Settlement preliminarily approved by the Court, and as well have appropriately evaluated the reasonableness of the benefits that will be going to the Settlement Class. (Pomerance Decl., ¶ 10.)

Given the substantial delays resulting from further prosecution of this lawsuit, Chase's likely renewal of its motion to dismiss if the Settlement is not approved, the Court's denial of the Motion for Class Certification, and the serious and fundamental question of whether the Settlement Class would ever prevail on the merits, Class Counsel is confident that the Settlement is more than fair and reasonable, and that final approval should be granted by the Court. (Pomerance Decl., ¶ 11.)

III. THE SETTLEMENT

The Settlement reached by the parties provides real and tangible benefits to the Settlement Class, and as such, more than meets the standards required to be deemed fair and reasonable. This is an all cash settlement, and does not involve the provision of coupons whatsoever. If approved, the key terms of the settlement are as follows:

(a) Chase will contribute $5.5 million for the benefit of the Settlement Class (Pomerance Decl., ¶ 12; Exhibit (Exh.) 2, Settlement Agreement, §4.1.);

(b) All Settlement Class Members for whom the settlement administrator is able to determine a valid address shall receive a direct payment. (Exh. 2, §§ 4.4-4.6.) These class members need not make a claim or do anything in order to receive payment. Based on confirmatory discovery provided prior to preliminary approval, there were approximately 439,000 Settlement Class Members who were eligible to receive direct payments. (Pomerance Decl., ¶ 13.)[1] The discovery had also disclosed that this group incurred an average finance charge of approximately $40.33. (Pomerance Decl., ¶ 14.) The direct payments were therefore calculated to be approximately $10 each. (Pomerance Decl., ¶ 15.) Thus, this group is set to receive back approximately 25% of the average finance charge. (Pomerance Decl., ¶ 16.);

(c) Chase has agreed, subject to this Court's approval, to pay service awards to Plaintiff Gene Castillo and Gary Davis in amounts not to exceed $5,000 each, to compensate them for their time and effort in prosecuting this case (Exh. 2, §5.1.);

(d) Chase has also agreed, subject to court approval, not to oppose Class Counsel's fee request up to $1.5 million – ***which represents about 27% of the $5.5 million common fund.*** (Exh. 2, §5.1.) The attorneys' fees were negotiated separately from and after the parties reached their agreement on the benefits going to the Class (Pomerance Decl., ¶ 17.);

(e) Costs of notice and administration are to be deducted from the settlement fund. (Exh. 2, §§4.2, 4.4).

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[1] There were 438,969 class notices subsequently mailed out by the claims administrator.

IV. THE SETTLEMENT WARRANTS FINAL APPROVAL

As a matter of public policy, settlement is a strongly favored method for resolving disputes. *See Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989). This is especially true in complex class actions such as this one. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

A. Standards for Final Approval

Federal Rule of Civil Procedure 23(e) requires judicial approval for the compromise of claims brought on a class basis. In *Officers for Justice*, the Ninth Circuit set forth the factors the trial court should consider in assessing whether a proposed settlement is fair, reasonable, and adequate.

> Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate, and reasonable. The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial, the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Id. at 625 (citations omitted). *Accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

1. Plaintiff Has Engaged In Sufficient Discovery and Investigation to Properly Evaluate the Propriety of Settlement

As a result of extensive negotiations and discovery, counsel have been able to fairly and properly evaluate the risks of litigation and the propriety of this Settlement. In addition to formal discovery over the course of several years, Class Counsel also conducted a thorough investigation and analysis of data that was voluntarily supplied under oath by Chase's authorized representative. The information Class Counsel received from Chase through both formal and informal discovery was detailed, thorough, and directly responsive to Class Counsel's inquiries. (Pomerance Decl., ¶¶ 18-20.)

After analyzing the discovery, Class Counsel persisted in asking follow up questions which Chase answered. In addition to carefully studying the information obtained through formal and informal confirmatory discovery, Class Counsel have also carefully evaluated the legal issues, including the Court's denial of the Motion for Class Certification, the potential that the Court may grant Chase's motion to dismiss, and the likelihood of prevailing on the merits. (Pomerance Decl., ¶ 21.)

Class Counsel therefore believes that they have sufficiently analyzed both the liability and damages information necessary to properly evaluate the propriety of the Settlement. Based on this analysis, Class Counsel have determined that a settlement of $5.5 million is fair, reasonable, and adequate, and in the best interest of the Settlement Class. (Pomerance Decl., ¶ 22.)

2. The Strength of Plaintiff's Case, When Balanced Against the Risk, Expense and Duration of Further Litigation, Supports Approval of This Settlement

This Settlement is well within the range of possible approval. The Court has denied the Motion for Class Certification. In most such cases that would be

the end. Any potential settlement on behalf of a class would be highly improbable. Despite this, efforts were made to bring in another class representative. While these efforts were underway, Chase moved to dismiss the case on the grounds that the case is now moot. While the Court vacated the hearing on that motion when it granted preliminary approval of the Settlement, it is entirely possible that the Court may grant Chase's motion to dismiss if the Settlement is not finally approved and Chase renews its motion. In that event, the Settlement Class would get nothing.

In addition, even if the Court were to deny Chase's motion to dismiss, several obstacles remain to the Settlement Class prevailing on the merits at trial. A substantial risk will remain that the class will not be certified. For example, Chase has argued and will undoubtedly continue to argue that the circumstances surrounding each particular transaction, including the possible violation of the terms of the cardmember agreement by cardholders, will result in individualized issues.

Finally, even if the class were certified, it is far from certain that the class would prevail on the merits. Chase has vigorously disputed Plaintiff's claims on the merits. Chase contends that its cardmember agreement and other materials expressly allowed it to allocate payments to lower-interest balances before higher-interest balances. And, just getting to a trial on the merits could take up to several years more, on top of the eight years that the case has thus far proceeded. Final approval of the Settlement eliminates the risks associated with continuing litigation, including possible outright dismissal, as well as the substantial risk of no recovery after several more years of litigation.

The immediacy and certainty of recovery is a factor for the court to balance in determining whether the proposed settlement is fair, adequate and reasonable. *See In Re Mego Financial Corporation Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Hence, the present Settlement must be balanced against the

expense, risk and delay of achieving a more favorable result at trial.

Approval of the Settlement means a present, tangible and significant recovery for the Settlement Class. The benefits are all cash – no coupons whatsoever. Individuals were billed on average approximately $40.33 in improper finance charges, and most of the Settlement Class Members (if the Settlement is approved) will receive approximately $10, without needing to file a claim form or dig up records, which in some cases may be a decade old. The Settlement Class Members, of which there are approximately 439,000, will be receiving about 25% of their total claimed damages on a completely risk free basis, without any further delay, and without further risk of dismissal of the entire case.

Absent the Settlement, the case will likely proceed with a hearing on Chase's motion to dismiss, Gary Davis' motion for leave to amend, and Gene Castillo's motion to intervene. Additional discovery will proceed, if allowed by the Court, and yet another motion for class certification will take place. If that is granted, more rounds of motions to dismiss and for summary judgment are expected. While Class Counsel believes they have well-founded arguments in support of their claims, there is no question that final approval of settlement at this time ensures an immediate and substantial recovery for Settlement Class Members with no further risk whatsoever.

3. The Recommendations of Experienced Counsel Favor the Approval of Settlement

Class Counsel have concluded that the settlement is fair, reasonable, and adequate after carefully considering and evaluating, among other things, the relevant legal authorities and the substantial data and information provided by Chase, as well as evaluating the likelihood of prevailing on the merits, the risks, expense and duration of continued litigation, and the likely appeals and subsequent proceedings necessary if Plaintiff did prevail against Chase at trial. There is no question the Settlement is fair, reasonable, and adequate, and in the

best interest of the Settlement Class.

Due to Class Counsels' extensive efforts over an eight year period on the Settlement Class' behalf and the settlement achieved, Class Counsel have provided fair and adequate representation to the Settlement Class. Class Counsel have significant experience in complex class action litigation and have negotiated numerous other substantial class action settlements throughout the country. Where, as here, the settlement is the product of serious, informed, non-collusive negotiations, significant weight should be attributed to the belief of experienced Class Counsel that settlement is fair, reasonable, and adequate, and in the best interest of the Settlement Class. *See National Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (finding that "'great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."); *In Re Washington Public Power Supply Systems Securities Litigation*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989), *aff'd sub nom., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1296 (9th Cir. 1992).

V. CERTIFICATION OF THE SETTLEMENT CLASS IS PROPER

The parties have stipulated to class certification for settlement purposes only. (Pomerance Decl., ¶ 12; Exh. 2, §3.1.) The Supreme Court has expressly approved the use of a settlement class. *See Amchem Products v. Windsor*, 521 U.S. 591, 620 (1997). Plaintiff requests that the court enter an order certifying a class for settlement purposes, defined as follows:

> All Chase Circuit City Rewards Credit Cardmembers with California billing addresses who, between May 26, 2004 and the entry of preliminary approval of this Settlement (inclusive), made a promotional or deferred-interest purchase at Circuit City and who, as a result of payments or credits being allocated to a regular purchase balance after the promotional or deferred-

interest balance, paid more in finance charges than they would have paid if the payments or credits had first been applied to the regular purchase balance.

The agreed upon Settlement Class satisfies all requirements of Federal Rule of Civil Procedure 23(a) and (b)(3).

A. The Settlement Class Is So Numerous That Joinder of All Settlement Class Members Is Impracticable

Rule 23(a)(1) requires a class be so numerous that joinder of all class members is "impracticable." That phrase does not require that joinder be impossible, only that it would be difficult or inconvenient to join all class members. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). There is no fixed number of class members that either compels or precludes class certification. *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994).

Here, there is no question that the Settlement Class satisfies the numerosity requirement. Notices have been mailed out to 438,969 Settlement Class Members, and obviously joinder would be highly impracticable.

B. Common Questions of Law and Fact

Federal Rule of Civil Procedure 23(a)(2) requires that there be questions of law or fact common to the class. A common nucleus of operative facts suffices to satisfy the commonality requirement. *See Moore v. Fitness Intern., LLC*, 2013 WL 3189080, 5 (S.D. Cal. 2013); *Hanlon*, 150 F.3d at 1019-1020. Rule 23's "commonality" requirement is not particularly rigorous. Indeed "one significant issue common to the Class may be sufficient to warrant certification . . . the necessary showing to satisfy commonality is minimal." *Blackwell v. Sky West Airlines*, 245 F.R.D. 453, 460 (S.D. Cal. 2007).

Here, there are numerous questions of fact and law that would satisfy Rule 23(a)(2), including:

1. Whether Chase's payment allocation policy breached the terms of the cardmember contract when Chase gave priority of payment to promotional items that were not yet due or owing;
2. Whether Chase's allocation of payments violates the Unfair Competition Law because it is contrary to the advertisements used to promote the promotional purchases;
3. Whether Chase's allocation of payments violates the Unfair Competition Law because it is contrary to the cardmember contract;
4. Whether Chase's payment allocation policy was applied in a uniform and consistent manner to the Settlement Class as a whole.

Underlying these basic common questions is a common nucleus of operative facts pertaining to Chase's marketing of its Circuit City Rewards Card promotional purchases, and how it allocated its customers' payments on the card. Thus, the Settlement Class satisfies the commonality requirement of Federal Rule of Civil Procedure 23(a).

C. Plaintiff's Claims Are Typical of Those of the Settlement Class

"Representative claims are typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *accord Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Rule 23(a)(3) requires only that there be no express conflict between the representative parties and the class over the very issue in litigation and that the representative's interests are not antagonistic to those of the class. *Stolz v. United Brotherhood of Carpenters and Joiners, et al.*, 620 F.Supp. 396, 404 (D. Nev. 1985).

While this Court recently determined that Gary Davis could not represent a class if the class were to be certified in a ruling by the Court, Chase has stipulated and agreed, for purposes of certifying a settlement class, to Plaintiff Gene Castillo

serving as the class representative, and to his adequacy to serve in that capacity. (Exh. 1, § 3.1.) The typicality requirement is satisfied here through Plaintiff Gene Castillo serving as class representative because he and the Settlement Class Members alleged the same set of operative facts. Mr. Davis is still a putative member of the Settlement Class. They and every putative Settlement Class Member made a promotional or deferred-interest purchase at Circuit City and had their payments or credits allocated to a regular purchase balance after the promotional or deferred-interest balance, which resulted in more finance charges than they would have paid if the payments or credits had first been applied to the regular purchase balance. There is no dispute that the class representative falls directly within these allegations, and thus satisfies the typicality requirement.

D. The Adequacy Requirement Is Satisfied

Rule 23(a)(4) requires "the representative parties will fairly and adequately protect the interests of the class." Courts have established a two-prong test for this requirement. *See, e.g., In re Apple iPod iTunes Antitrust Litigation*, 2008 WL 5574487, 6 (N.D. Cal. 2008) (citing *Hanlon*, 150 F.3d at 1020); *Schaefer v. Overland Express Family of Funds*, 169 F.R.D. 124, 130 (S.D. Cal. 1996). First, counsel for the class representative must be competent to undertake the particular litigation at hand. Second, there can be no antagonism or disabling conflict between the interests of the named class representative and the members of the class. *See Hanlon*, 150 F.3d at 1020.

Plaintiff's claims do not conflict with the Settlement Class' claims. First Mr. Davis, and now Mr. Castillo, have vigorously pursued common claims on behalf of themselves and all Settlement Class Members. All claims are directed at resolving the issues raised by Chase's allocation of payments to promotional and non-promotional purchases, an issue common to all Settlement Class Members. Mr. Davis' and Mr. Castillo's vigorous pursuit of this litigation confirms their strong interest in achieving a successful result for the Settlement Class. Further,

Class Counsel have extensive experience in the area of consumer class action litigation, and have successfully prosecuted numerous class actions and other complex litigation on behalf of injured consumers in this District and across the country. There can be no legitimate dispute that Class Counsel has vigorously and skillfully prosecuted this litigation, securing a settlement that is fair, reasonable, and adequate, and in the best interest of the Settlement Class. In addition, Chase has stipulated and agreed, for purposes of certifying a settlement class, that Plaintiff Gene Castillo is an adequate class representative.

The second requirement also is satisfied here. There is no antagonism between the representative and the absent Settlement Class Members. All claims arise from the same set of operative facts and course of conduct, and both Plaintiff and absent Settlement Class Members share the common goal of maximizing recovery. *Lubin v. Sybedon Corp.*, 688 F.Supp. 1425, 1461 (S.D. Cal. 1988).

E. The Settlement Class Satisfies Rule 23(b)(3)

In addition to meeting the prerequisites of Rule 23(a), the present action satisfies the requirements of Rule 23(b)(3), which mandates that common questions of law or fact predominate over individual questions and that a class action is superior to other available methods of adjudication. *See Hernandez v. Alexander*, 152 F.R.D. 192, 193-94 (D. Nev. 1993). Here, common questions of law and fact predominate, and a class action is the superior, if not the only, method available to fairly and efficiently litigate these claims.

1. Common Questions of Law and Fact Predominate

Where a complaint alleges a common course of misrepresentations, omissions and other wrongdoings that affect all members of the class in the same manner, common questions predominate. *Blackie v. Barrack*, 524 F.2d 891, 905-8 (9th Cir. 1975). The Court's inquiry should be directed primarily toward the issue of liability. *Id.* at 902.

There are a host of common questions of law and fact, which Plaintiff seeks

to certify. As discussed above, Plaintiff seeks certification for causes of action arising under the Unfair Competition Law, and basic contract law. Three factual issues bear on these claims: (i) Chase's application of the terms of its cardmember agreement with respect to the allocation of payments when a cardholder made promotional and non-promotional purchases; (ii) Chase's assessment of finance charges based on its allocation of payments; and (iii) whether Chase's actions violated the terms of its contract and were contrary to its advertisements. These common factual issues predominate over any purported individual factual issues.

2. A Class Action Is Superior to Other Available Methods for Resolving this Controversy

Rule 23(b)(3) also requires the Court to determine that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." A class action is superior where "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

The class action vehicle is the superior method for adjudicating relatively low-value consumer claims. *See, e.g., Miletak v. Allstate Ins. Co.* 2010 WL 809579, 13 (N.D.Cal. 2010) ("a class action is superior when it is the only realistic form of adjudication available") (citing *Valentino*, 97 F.3d at 1234-35). Where "each member's claim is likely too small to be worth pursuing in an individual action . . . a class action may be the only method for providing meaningful recovery." *Miletak* 2010 WL 809579 at 13; *see also Lowden v. T-Mobile USA, Inc.* 512 F.3d 1213, 1218 (9th Cir. 2008) ("when consumer claims are small but numerous, a class-based remedy is the only effective method to vindicate the public's rights.")

Here, Plaintiff presents class-wide allegations premised on common evidence. Trying each class claim separately would be inefficient, when each of thousands of cases would allege identical misconduct and offer identical proof of